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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 701

BENDIX AVIATION CORPORATION,

Appellant,

vs.

INDIANA DEPARTMENT OF STATE REVENUE, INDIANA REVENUE BOARD, INDIANA GROSS INCOME TAX DIVISION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF INDIANA.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

The opinion of the Supreme Court of Indiana is not yet officially reported but is found, unofficially, in 143 N. E. (2d) 91, and hereinafter as Appendix "A". This Appellant's petition for rehearing was denied without opinion. The opinion of the trial court is reproduced hereinafter as Appendix "B".

JURISDICTION.

This appeal is from a final order of the Supreme Court of Indiana reversing the trial court, St. Joseph Superior Court No. 1, and directing it to enter judgment for the Appellee herein in a statutory action brought by Appel-

lant for the refund of certain gross income taxes demanded by and paid to Appellee by the Appellant. The action for refund was brought pursuant to the provisions of Indiana Acts of 1933, Chapter 50, § 14, as amended (Burns' Indiana Statutes Annotated 1933 [1951 Replacement Vol. 11, Part 2] § 64-2614) and upon the ground that the taxes sough to be recovered were levied in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

Final judgment of the Supreme Court of Indiana was issued June 5, 1957. On June 21, 1957, this Appellant filed a petition for rehearing, pursuant to Rule 2-22 of the Rules of the Supreme Court of Indiana. On September 9, 1957, the petition was denied without opinion. The Notice of Appeal was filed in the Supreme Court of Indiana on the 8th day of November, 1957.

The jurisdiction of this Court to review the judgment of the Supreme Court of Indiana on direct appeal is conferred by 28 U. S. C. § 1257 (2) and is sustained by the following decisions:

J. D. Adams Mfg. Co. v. *Storen*, 304 U. S. 307; 58 S. Ct. 913

International Harvester Co. v. *Department of Treasury*, 322 U. S. 340; 64 S. Ct. 1019; 322 U. S. 349; 64 S. Ct. 1030.

Freeman v. *Hewit*, 329 U. S. 249; 67 S. Ct. 274.

Gwin, White & Prince, Inc. v. *Henneford*, 305 U. S. 434; 59 S. Ct. 325.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282; 42 S. Ct. 106.

STATUTES INVOLVED.

The Statute of Indiana involved in this appeal is Indiana Acts of 1933, Chapter 50, Section 2, Page 390, as amended Acts of 1937, Chapter 117, Section 2, Page 604, and Section 6, Page 392, as amended Acts of 1937, Chapter 117, Section 6, Page 604 (Burns' Indiana Statutes Annotated 1933 [1951 Replacement Vol. 11, Part 2] § 64-2602 and § 64-2606). Section 2 reads as follows:

> "There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the state of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the state of Indiana, of all persons who are not residents of the state of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities * * *."

The relevant portions of Section 6 read as follows:

> "Exemptions.—There shall be excepted from the gross income taxable under this act:
>
> (a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the state of Indiana is prohibited from taxing such gross income by the Constitution of the United States by America. * * *"

The Supreme Court of Indiana held that Article I, Section 8, Clause 3, of the Constitution of the United States

(hereinafter called the Commerce Clause), did not prohibit taxation by Indiana of the gross receipts arising out of the performance of the contracts upon which this action was based.

QUESTIONS PRESENTED.

The questions themselves appear here as originally set forth in the Notice of Appeal. The explanatory portion preceding the questions is revised.

All of the gross receipts taxed by the Appellee herein (hereinafter sometimes called "the State") arose out of the performance of contracts between Appellant as a prime contractor and the United States of America, or from contracts between Appellant as a sub-contractor and out-of-state corporations, each of which was a prime contractor with the United States. With respect to all of the contracts, the fact situation appears to fall directly under the rule of *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; 58 S. Ct. 913, and *Freeman* v. *Hewit*, 329 U. S. 249; 67 S. Ct. 274, unless the protection of the Commerce Clause does not extend to gross receipts from transactions in which the seller has

> (a) made delivery of the manufactured items at the seller's expense and by seller's equipment and employees free on board the equipment of a common carrier at a point in the state of origin for immediate transportation to a destination outside the state of origin, and
>
> (b) shipment is made on Government bills of lading.

These two elements of fact are true with respect to all of the contracts including both those in which Appellant acted as a prime contractor and those in which Appellant acted as a sub-contractor. The other elements of fact upon which the Appellee had relied, severally and in every

combination, apply to less than all of the contracts, but present, severally and in combination, unique and knotty problems.

The principal questions presented are:

1. Whether the gross receipts from the above described transactions are taxable because delivery was made f. o. b. a common carrier at an Indiana point and shipment was on a Government bill of lading?

2. Assuming Question 1 is answered in the negative, then as to contracts in which Bendix is a prime contractor with the United States, whether the addition of the particular "inspection and acceptance" provision of the contracts, or the fixing of the out-of-state destination by a direction given substantially in advance of shipment under contractual right, rather than in the contract itself, or the making of a partial payment which contractually passes title to the United States, until the payment is recaptured on succeeding invoices when title revests in Bendix, or any combination of any of these additions make the gross receipts from the above described transactions taxable?

3. Assuming Question 1 is answered in the negative, then as to contracts in which Bendix is a sub-contractor to a prime contractor with the United States, whether the addition of contractual inspection and acceptance arrangement where inspection and acceptance was actually made in Indiana by inspectors of the United States, but the prime contractor reserved by contract the right to accept or reject the goods outside of Indiana, make the gross receipts from the above described transactions taxable?

STATEMENT OF THE CASE.

The Appellant, Bendix Aviation Corporation (hereinafter sometimes referred to as "Bendix") is a Delaware Corporation, qualified and admitted to do business in Indiana, with a manufacturing plant at South Bend, St. Joseph County, Indiana, at which all the goods involved in the transactions out of which this case arises were made.

The transactions which produced the gross receipts involved in this appeal arose from two (2) general kinds of contracts:

(a) Contracts between Bendix as a prime contractor and the United States of America;

(b) Contracts between Bendix as a sub-contractor and out-of-state corporations, each of which was a prime contractor for the United States of America.

All of the contracts were negotiated and executed outside of Indiana. All of the contracts called for the manufacture, sale, delivery and shipment by Bendix of certain items. All of the contracts required that delivery be made f. o. b. equipment of a common carrier at an Indiana point for shipment on Government bills of lading. All of the items were shipped to destinations outside of Indiana.

Up to December 27, 1950, the State had never claimed that gross income taxes were payable on gross receipts arising from transactions of the kind described. On that date by office memorandum the State announced that taxes would be levied on such gross receipts. The new ruling, originally intended to be retroactive to January 1, 1950, was modified so that the levy began on gross receipts from such transactions received on and after January 1, 1951. Bendix paid the taxes as demanded and on February 28, 1954, filed a claim for refund encompassing taxes paid on

gross receipts from such transactions between January 1, 1951, and September 30, 1953. The claim for refund was denied. Thereafter Bendix sued for recovery of the tax monies in accordance with Indiana statutory requirements, together with World War II Bonus Taxes which were payable under the same Statute for a portion of the period and which are not hereinafter separately identified.

The State's position at first was simply that gross receipts from all shipments made on Government bills of lading were taxable. In the State's letter denying the Bendix claim for refund (Tr. p. 17, ll. 25-7)[1] there is an acknowledgment that the claim for refund has been filed followed by these words:

> "Please be advised that the Division considers shipments made on Government Bills of Lading taxable in their entirety.
>
> "Therefore your Claim for Refund is denied."

How the Federal Questions Arose.

After denial of its claim for refund Bendix commenced suit June 2, 1954, and on March 21, 1955 filed an amended complaint upon which the cause was tried (Tr. p. 7, ll. 17 ff.). The amended complaint sought recovery of the taxes paid on the ground that the imposition of the tax was contrary to Article 1, Section 8, Clause 3 of the Constitution of the United States (Tr. p. 9, l. 8—p. 11, l. 22). On the same day the State filed its answer to the amended complaint and established the issues by denying specifically Paragraphs 8, 9, 10 and 11 of the amended complaint, among others, which were the paragraphs setting forth the illegality of the tax under Article 1, Section 8, Clause 3 of the Constitution (Tr. p. 18, ll. 23-5).

1. References to the typewritten certified transcript of record will be shown so.

On April 25, 1955, the cause was submitted for trial and the parties by agreement filed a Stipulation of Facts, which was the only evidence submitted in the action (Tr. pp. 19, 38-102).

No question concerning the propriety of this Appellant's suit and no procedural questions were ever raised. The sole and single problem from the moment issue was joined to the time of denial of this Appellant's petition for rehearing in the Supreme Court of Indiana, was whether or not the State of Indiana was barred by Article I, Section 8, Clause 3 of the Constitution of the United States from levying and collecting this tax upon the particular gross receipts. In the opinion of the Trial Court (Appendix "B", p. xx) the Judge stated the contentions of the parties as follows:

> "Plaintiff contends that the transactions are interstate in nature so that they cannot be taxed under the Indiana Gross Income Tax Act.
>
> "Defendant contends that certain practices and contractual provisions between the plaintiff and the U. S. Government, or contractor of the U. S. Government, make each of the transactions involved intra-state, with only interstate attributes."

Before his direction that a form of judgment be prepared the Trial Judge concluded as follows (Appendix "B", p. xxiv):

> "In the opinion of this court, all the transactions here considered are interstate in nature and cannot be construed as intrastate with only interstate attributes. These transactions directly involve the great universal stream of commerce between the several states. It must be remembered that the Indiana Gross Income (*sic*) has expressly been determined to be a burden on interstate commerce and that if the Indiana Legislature wishes to tax transactions such as those

here involved it may at any time adopt a privilege tax and do so. It is not the duty of the court to establish the taxing policy of this state."

Judgment was entered for this Appellant on April 18, 1956 (Tr. pp. 30-1). Thereafter the State filed motion for a new trial assigning as its reasons that the decision of the Trial Court was not sustained by sufficient evidence and was contrary to law, which motion was overruled on the same date, April 20, 1956 (Tr. p. 31, l. 22—p. 33, l. 10). On same date the State filed its Praecipe of Transcript (Tr. p. 105), followed on July 3, 1956, by the tendering of its Bill of Exceptions which was approved (Tr. p. 33), and on July 18, 1956, the State filed its Transcript of Record with the Clerk of the Supreme Court of Indiana assigning as error the overruling of its motion for a new trial (Tr. p. 1).

In the State's brief filed in the Supreme Court of Indiana (excluding record references no longer applicable) the State said:

"WHAT THE ISSUES WERE.

"The issues were formed on appellee's amended complaint and appellant's answer of affirmation and denial. Appellee contends that the tax imposed upon its receipts from the sale of products to the United States Government and to its prime contractors on Government contracts where shipments were made on U. S. Government bills-of-lading to destinations outside the State of Indiana was illegal as a tax upon interstate commerce violating Clause 3 of Section 8, Article 1 of the U. S. Constitution, and contrary to Paragraph (a) of Section 6, Chapter 50 of the Acts of the Indiana General Assembly of 1933, as amended, the same being Section 64-2606, Paragraph (a) (Burns' Indiana Statutes Ann. (1953 Replacement)).

"Appellant denies these contentions by its answer."

In the opinion of the Supreme Court of Indiana at Appendix "A", p. iv, appear the following words:

> "It is appellee's contention that the receipts from all of these contracts are not subject to the gross income and bonus taxes of the State of Indiana for the reason that the State is prohibited from taxing such transactions under the Commerce Clause (Art. 1, § 8, Cl. 3), of the United States Constitution."

The pleadings, the briefs and the opinions of the Trial Court and of the Supreme Court of Indiana as well as Bendix' petition for rehearing (Tr. pp. 128-131) all combine to show that this Federal Constitutional question arose at the beginning of the case, remained the only issue in the case and was required to be and was decided by the Supreme Court of Indiana.

STATEMENT OF THE CASE.

(Resumed.)

The issue never changed; the argument of the State did, however, change, in part, in the appeal before the Supreme Court of Indiana.

Two contract requirements were true of all of the various agreements which produced the gross receipts:

> (a) All required delivery f. o. b. equipment of a common carrier in Indiana;
>
> (b) All required shipment to the out-of-state destinations on Government bills of lading.

In briefs and argument before the Trial Court, delivery f. o. b. equipment of a common carrier in Indiana was not treated by the State as indicative of a "local transaction," but was consistently accepted as falling within the rule of *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; 58 S. Ct. 913, and *Gross Income Tax Division* v. *Conkey*,

228 Indiana 352; 90 N. E. (2d) 805; cert. den. 340 U. S. 941; 71 S. Ct. 504.[2]

In its Reply Brief in the Supreme Court, the State introduced its argument to the effect that delivery f. o. b. common carrier in Indiana resulted in a "local transaction," unless the seller owed some obligation to see that delivery was actually made to the out-of-state destination.

It would be bootless to consider or evaluate the two points separately at this stage since the Supreme Court of Indiana combined them. Therefore, we treat of these points in combination as the basis of the State's justification of its refusal to make the refund and as the basis of the reasoning of the Supreme Court of Indiana through which it decided (Appendix "A", p. xvii):

> "Looking at these facts as a whole before us, the receipts resulted from transactions completely performed in Indiana. The performance was essentially local in character. The tax does not discriminate against interstate commerce nor does it interfere with the grant of power of Congress to regulate commerce among the several states."

It would be pleasant to be able to say that the foregoing constitutes an adequate statement of the case. There are a certain number of complicating factors which must find expression here, as they have found expression in Questions 2 and 3 of the "Questions Presented."

Those contracts in which Bendix performed as a prime contractor for the United States of America included provisions with respect to "inspection and acceptance," which the State contended brought the gross receipts derived

2. Certiorari was sought in the *Conkey* case by the State of Indiana as to that portion of the decision of the Supreme Court of Indiana which found that delivery f. o. b. an Indiana point for shipment to an out-of-state destination was an interstate movement and that the gross receipts arising from these transactions were not taxable under the Federal Constitution.

from such contracts under the rule of *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62; 61 S. Ct. 885. Appellant's position with respect to these "inspection and acceptance" provisions was simply that they extended to quantity and quality only and that the specific requirement of delivery on board a common carrier with shipping papers showing an out-of-state destination made the application of the *Wood Preserving* case wholly improper. The Trial Court ruled for Appellant on this point (Appendix "B", p. xxi).

The State also contended that in those instances in which advance payments were made by the United States to Bendix as a prime contractor under the "partial payment" provisions of a contract, Bendix became a bailee performing special services rather than a manufacturer making and selling goods. The contract provided that when monies were advanced, title to the raw materials, partially finished and finished goods forthwith vested in the United States and with equal immediacy revested in Bendix as the advanced monies were repaid in accordance with a contract formula. The Appellant contended that the passage of title was a minor incident in a larger transaction constituting a special arrangement between the parties and wholly unrelated to the nature of the transaction. The Trial Court ruled for Appellant on this point (Appendix "B", p. xxiii).

As we have stated all of the goods, the manufacture, delivery and shipment of which resulted in the gross receipts taxed went to destinations outside of Indiana. In some of the prime contracts between Bendix and the United States the destinations of all of the goods were directly set forth. In some of the contracts the destinations of some of the items to be manufactured were set forth and the remaining items were to be shipped to destinations which the parties agreed the United States might, in writ-

ing, fix at a date after the execution of the contract but substantially before the time of shipment. The State contended that the use of the shipping instruction arrangement meant that the parties did not contemplate a transaction in interstate commerce, since the shipping instructions might provide for a destination inside Indiana. The Appellant contended that the contractual arrangement was legitimate; that the law does not require that the parties specifically contemplate every detail of a transaction at the moment of execution of a contract; that if the instructions, when given, identified a point inside of Indiana as the destination, those gross receipts would be clearly taxable and that it was equally clear the gross receipts were not taxable if the instruction identified a destination outside the State of Indiana. The Trial Court ruled for appellant on this point (Appendix "B", p. xxi).

Each of the foregoing points, that is, the point concerning "inspection and acceptance"; the point concerning "partial payments" and the point concerning the fixing of an out-of-state destination subsequent to contract execution, constituted a partial defense which the State raised and urged both in the Trial Court and in the Supreme Court. They are preserved in this appeal as the constituent parts of Question 2 of the "Questions Presented".

Question 3 is intended to preserve one additional partial defense relied upon by the State in relation to the meaning of the "acceptance" provisions of the sub-contracts involved in this case. The argument here is very similar to that under "inspection and acceptance" point with respect to the prime contracts. The Trial Court ruled for appellant on this point (Appendix "B", p. xxiii).

The Supreme Court of Indiana adverts in its opinion to two of the four partial defenses. In neither instance does it appear with clarity whether the Court actually relies, even in a small way, upon these two matters in reaching

its decision. These references are to the question of "inspection and acceptance" under the prime contracts and the question of "partial payments" under the same contracts, but limited, of course, to those as to which partial payments were actually made. The discussion concerning these two points appears in the opinion of the Supreme Court of Indiana (Appendix "A", pp. ix, x, xi).

While there is this doubt concerning the place in the opinion of the Supreme Court of Indiana of these two partial defenses, there is no doubt concerning the principal defense of the State which extends to all of the transactions. The Court ruled that the delivery free on board the equipment of a common carrier in Indiana of goods accompanied by shipping papers showing an out-of-state destination were "transactions completely performed in Indiana," (Appendix "A", p. xvii) if the shipping papers were Government bill-of-lading and if there was no "obligation to make deliveries, or put the buyer in possession at a point outside of the State of Indiana" (Appendix "A", p. xiv).

The Court decided that the Commerce Clause was not a bar to the application of the Indiana Gross Income Tax Act to the gross receipts arising from the transactions described, reversed the Trial Court and directed the entry of judgment for the State.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

The same order will be observed in this section as was used under the heading 'Questions Presented".

Question 1.

The Supreme Court of Indiana has held that the imposition of the gross receipts tax upon the gross receipts arising from the transactions earlier described is not barred by the Commerce Clause, because delivery was made f. o. b.

common carrier in Indiana and shipment to the out-of-state destination was made on Government bills-of-lading. In abbreviated form the reasoning and conclusion of the Indiana Supreme Court may be expressed thusly:

> By the law of sales, title passed to the United States when the manufactured items were delivered on board the common carrier; by the law of contract or agency, the common carrier became the agent of the United States under the Government bills-of-lading. Hence, "the Government had control and possession and could have re-routed or stopped the transportation at any point thereafter" (Appendix "A", p. xiii), and since the common carrier was the agent of the United States, "it is the same as if the purchaser in person had taken the articles at the plant" (Appendix "A", p. xv). Therefore, the rule applied to Class D sales in *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340; 64 S. Ct. 1019; 322 U. S. 349; 64 S. Ct. 1030, governs.

No such restrictive definition of interstate commerce under the Commerce Clause has been promulgated or approved and no such enlargement of the power of a State to impose taxes free of the effect of the Commerce Clause has been authorized by decision of this Court. There are no direct rulings by this Court, but there are cases pointing clearly in the opposite direction.

One cannot deny the fundamental principles of the law of sales, of the law of contracts, or of the law of agency. It must be remembered, however, that they are legal principles and not facts. A legal principle, valid in the area of its competence, is a useless and possibly harmful device if inappropriately employed. This Court has not approved any method by which the difficult art of constitutional interpretation may be reduced to a simple mechanical function. Constitutional significance is not determined by adding up the "fictions" of various unrelated fields of law; nor by applying principles of subsidiary areas of the law

as though such principles achieve the status of controlling fact. This method has not been followed in practice and cannot be considered justifiable in theory.

The first test of the Indiana Gross Income Tax Act in this Court resulted in a decision basic to applications by the State of that law. *J. D. Adams* v. *Storen*, 304 U. S. 307; 58 S. Ct. 913. Later cases testing the application of the same law to various fact situations have resulted in the recognition of certain distinctions by this Court. The rule of *Adams* v. *Storen* has not been revoked by this Court. To the extent, however, that the mechanical distinctions made by the Supreme Court of Indiana between kinds of shipments and kinds of bills-of-lading prevail, to that extent the *Adams* case is overruled.

The transactions in this case were such that Bendix was under contract to fulfill an entire group of responsibilities before it became entitled to payment, *i.e.*, before it earned the gross receipts. Failure by Bendix to fulfill any one of its contractual promises would have cut off the right to any gross receipts. Among the things it promised to do and for which it received gross receipts from the United States was the delivery of the items it manufactured by its own personnel, using its own equipment, and entirely at its own expense, on board a common carrier accompanied by shipping papers showing an out of state destination. *Adams* v. *Storen* contains the following language:

> "It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities, that it must fail in its entirety so far as applied to receipts from sales interstate."

So far as we are aware this Court has not passed upon the question as to whether the Commerce Clause prevents or permits the collection of a state gross receipts tax when

shipment of the goods involved in the transaction producing the gross receipts is by Government bill of lading. This Court has not decided, although there are cases that deal with the question, whether delivery f.o.b. a point in the State of origin results in a "local transaction" or a transaction in the category of interstate commerce. Only one case directly faces the problem of the effect of the Commerce Clause on a State tax law when delivery is made f.o.b. common carrier, and that case is *Gross Income Tax Division* v. *Conkey,* 228 Ind. 352; 90 N. E. (2d) 805; cert. den. 340 U. S. 941; 71 S. Ct. 504. In that case the Supreme Court of Indiana made the same point with respect to f.o.b. delivery as this Appellant makes and reached the same conclusion this Appellant reached. In the instant case the opinion of the Indiana Supreme Court attempts to throw doubt upon the decision and the supporting language in the *Conkey* case, by arguing that "the printer or the seller assumed the obligation to make deliveries, or put the buyer in possession at a point outside the State of Indiana" (Appendix "A", p. xiv). No such factual or legal question appears or is answered in the *Conkey* case. In the *Conkey* case, the Indiana Supreme Court referred to certain decisions of this Court concerning the nature of delivery f.o.b. This new interpretation given to the *Conkey* case and the effort to make the delivery free on board a common carrier match the principles of the law of sales seems at variance both with the *Conkey* case and with certain decisions of this Court to which reference will now be made. Two cases state the principle of the stream of commerce as a decisive concept:

Pa. R. R. Co. v. *Clark Brother Coal Mining Co.,* 238 U. S. 456; 35 S. Ct. 896, and

Pa. R. R. Co. v. *Sonman Shaft Coal Company,* 242 U. S. 120; 37 S. Ct. 46.

These cases required interpretation of the Commerce Clause, but did not raise questions involving a State Tax Law. In expressing the power of Congress under the Commerce Clause, however, the language in these cases seems almost to anticipate the erosive effect of a decision such as the one from which this appeal is taken. Delivery was made f.o.b. the mines and the Court said:

> "The movement thus initiated is an interstate movement and the facilities required are facilities of interstate commerce. A very large part of what in fact is the interstate commerce of the country is conducted upon this basis, and the arrangements which are made between seller and purchaser with respect to the place of taking title to the commodity or as to the payment of freight, where actual movement is interstate does not effect either the power of Congress or the jurisdiction of the commission * * *"

This language militates against the validity of applying a rule of the law of sales as though it were the ruling tenet in the search for the meaning of the Commerce Clause.

This Court has said that a Federal Tax Law is invalid under the Import-Export Clause of the Constitution, Article I, Section 10, Clause 2, even though by the terms of the sale it was a fact, or assumed to be a fact, that title passed at the moment when the goods were delivered into the carrier's hands. *A. G. Spaulding & Bros.* v. *Edwards,* 262 U. S. 66; 43 S. Ct. 485. The language there used was as follows:

> "The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular

steps to the contemplated result. Getting the bill-of-lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Co. and that theoretically they might change their mind and might retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Co. was solely for the purpose of Delgado & Cia. and for their account and risk. Theoretical possibilities may be left out of account."

Reference is made to *Joseph* v. *Carter and Weeks Stevedoring Company*, 330 U. S. 422; 67 S. Ct. 815, and to *Hughes Bros. Timber Co.* v. *State of Minnesota*, 272 U. S. 469; 47 S. Ct. 170. The *Joseph* case indicates that work done to place goods on board a common carrier is interstate in character. The *Hughes* case indicates that delivery into the stream of commerce is not dependent on "title" questions.

The foregoing cases have a direct bearing on the decision appealed from in another way as well. The position which the Indiana Supreme Court takes with respect to the Government bill of lading is such that it is fair to equate "delivery f.o.b. common carrier" and "Government bill of lading" in their effect with respect to title. A Government bill of lading is limited in use to the carriage of goods which belongs to the Government so that the delivery of goods to a carrier for shipment on a Government bill of lading accomplishes in this respect the same result as the law of sales accomplishes when delivery is made f.o.b. a common carrier at the point of origin. It is in this way that the cases cited above have their direct bearing on this phase of the decision appealed from. The Supreme Court of Indiana relies on the use of Government bills of lading in another manner as well.

The Supreme Court of Indiana cites *Illinois Central R. R. Co.* v. *U. S.*, 265 U. S. 209; 44 S. Ct. 485, an appeal from the Court of Claims by a carrier seeking to collect

regular transportation rates rather than lower land grant rates. In that case goods were purchased by the United States Government and shipment was made on Government bills-of-lading. The Court said,

> "* * * The title passed to the United States by delivery at the initial point of shipment to the carrier as agent. Land-grant rates were applicable."

There are other cases in which the Supreme Court of the United States has characterized the carrier as "agent" in legal conflicts between the carriers and the Government. The Supreme Court of Indiana takes language which denominates the carrier as "agent" and then builds upon a perfectly respectable principle by stating that since the carrier was the agent of the Government, and since it took delivery of the manufactured articles as such agent, "it is the same as if the purchaser in person had taken the articles at the plant" (Appendix "A", p. xv).

By this process of reasoning the rule of *International Harvester Co.* v. *Department of Treasury*; 322 U. S. 340; 64 S. Ct. 1019; 322 U. S. 349; 64 S. Ct. 1030 is broadened to include not only the actual presence of the purchaser in the State of origin and the transfer there to such purchaser of title, possession, and complete dominion but also the fictional presence of the purchaser through a common carrier as "agent."

This reasoning uses the concept "agent," a helpful device of language in expressing the result in cases between the carrier and the United States Government, as a "fact" in the interpretation of the Commerce Clause. This is semantically a sin and does violence to the concepts that have been used in the interpretation of the Commerce Clause.

The Supreme Court of Indiana has reasoned itself into "a most ingenious paradox." Its search for the meaning of the Commerce Clause has led it to discover the static,

tranquil "local transaction" on the very back of the interstate carrier. At the very core and heart of the interstate commerce with which our country seethes, it has located and found a "local incident." It has confused "passage of title," which concerns only a particular buyer and a particular seller at any one time, with passage of goods which concerns all of the citizens in all of the States all the time.

> "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. * * * All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local', and thus achieve its desired result."
>
> *Nippert* v. *City of Richmond*, 327 U. S. 416, 423; 66 S. Ct. 586, 589.

The foregoing language is as apt and appropriate to the instant case as to the case in which it was used. See also the further substantiation of the principle expressed above:

> *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, et al.*, and *Panhandle Eastern Pipe Line Co.* v. *Calvert et al.* (two cases), 347 U. S. 157; 74 S. Ct. 396.

We submit that the Supreme Court of Indiana erred in its decision. On the one hand, the substantial character of the federal questions is virtually self evident. The view

of the Indiana Supreme Court of a delivery f.o.b. common carrier in the State of origin greatly impairs, if indeed, it does not totally destroy, the presently accepted constitutional concept of a stream of commerce. Further, the view of the Indiana Supreme Court of the Government bill of lading charges in its entirety the concept of the relationship of seller, buyer and common carrier in the field of interstate commerce. These two examples are substantial in terms of the constitutional questions themselves. The effect upon economic activity far outruns the interests of the parties to this action. The decision affects the largest single buyer of goods in the United States, the United States Government itself. The effects are not limited to the United States as buyer, but extend to all buyers. Nor are the effects limited to this Appellant as seller, but extend to all sellers. Nor are the effects limited to Indiana, but extend to all States.

There are substantial federal questions which are not as obvious as the foregoing. Other areas of constitutional interpretation and of our economic life will be severely changed and modified if the rule pronounced by the Indiana Supreme Court is accepted as the rule of this Court. A Government bill of lading is not different in any significant legal way related to commerce from an ordinary customer's commercial bill of lading. The potential explosive results of this aspect of the constitutional question may be felt in other areas both constitutional and economic.

We have not here presented, but if this Court shall find that the appeal is to be permitted, we will later point out the possibility that the application of the Indiana tax to these gross receipts is constitutionally questionable not alone under the earlier majority view, but under the dissent as expressed by Mr. Justice Black in *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307; 58 S. Ct. 913, on the grounds that the tax, applied to one part of interstate commerce and

not to the rentainder is discriminatory. The other minority view as expressed in the case of *J. D. Adams Mfg. Co.* v. *Storen,* and in later cases arising in Indiana and elsewhere, may well be reconsidered in terms of the constitutional meaning of "burden" in cases under the Commerce Clause involving state and local taxes, since there is no possibility of a tax in the State of destination when the United States of America is the buyer. These, too, are substantial federal questions touching important aspects of our legal and economic activities.

We submit that this Question 1 as decided by the Supreme Court of Indiana so far changes constitutional concepts and so markedly impairs the meaning and effect of earlier decisions of this Court that it should be considered and determined by this Court rather than by a State Court, after full opportunity for the submission of briefs and for oral argument.

Questions 2 and 3.

The partial defenses present federal questions more restricted in scope than that stated in Question 1, but each is nevertheless formidable and substantial.

The meaning and effect of "inspection and acceptance" provisions of the Government contracts alone raises a question economically substantial but it also raises a question important to federal law, since it involves an opportunity to explore further the meaning of the rule of *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62; 61 S. Ct. 885, in more normal and common economic circumstances than were presented in the *Wood Preserving* case itself.

The second partial defense raises a substantial question as to what shall be considered the content of an interstate transaction. Is a writing subsequent to the execution of an instrument and substantially before delivery an appropriate

means for parties to use or, as argued by the State of Indiana, is the nature of the transaction frozen at the moment the contract is entered into? Is a transaction doubtful as to its character as intra-state or interstate at its beginning to be considered intra-state regardless of further acts of the parties? We are not aware of any decision of this Court which answers these questions.

The third partial defense relating to "partial payments" also presents a substantial question concerning the meaning and interpretation of transactions and under what circumstances they are, in the constitutional sense, to be denominated interstate or local and, thus, to be given or denied the protection of the Commerce Clause.

Question 3 presents a partial defense similar in many respects to the first partial defense discussed above under Question 2 and therefore opens a federal question of similar substantiality.

All of the facts in this case were presented by stipulation and there is no dispute concerning them. The dispute is limited exclusively to the legal effect of these facts, and their bearing upon the constitutional question of whether or not the Commerce Clause is a bar to the imposition of the tax. Each of the questions raised by each of the groupings of fact as partial defenses by the State presents a substantial federal question, which we submit, in the state of the record of this case, this Court is empowered both to consider and decide.

It would appear that the Trial Court felt that consideration and decision of these partial defenses was necessary and did therefore pass upon each of them. In candor, it would appear that the Supreme Court of Indiana, while making reference to two of these partial defenses has not in a full sense considered and decided with respect to any one of them. Nevertheless, all that remains to be done is

the application to stipulated facts of a proper constitutional rule and this lies within the power of this Court. (28 U. S. C. § 2104, § 2106).

CONCLUSION.

The principal question as expressed in Question No. 1 and traced under Statement of the Case and discussed as a substantial federal matter under the appropriate heading, constitutes, as decided by the Indiana Supreme Court, a very broad and very damaging attack upon the Commerce Clause, the generally accepted concepts of interstate commerce as they have evolved in the opinions of this Court over the years, and upon normal and accepted economic activity of widest range. Each of the questions raised in the partial defenses, though more restricted in scope, is nevertheless substantial in both the constitutional and economic sense.

We respectfully suggest that this Court may find this case an appropriate one for plenary consideration with briefs and oral argument an aid in the proper resolution of the questions it presents.

Respectfully submitted,

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APPENDIX "A."

The State of Indiana.

IN THE SUPREME COURT.

On the 5th day of June, 1957, being the 9th Judicial day of said May Term, 1957.

No. 29458.

Hon. Norman F. Arterburn, *Chief Justice.*
Hon. James A. Emmert,
Hon. Arch N. Bobbitt,
Hon. Frederick Landis,
Hon. Harold E. Achor,
Associate Judges.

In the Case of Indiana Department of State Revenue, Indiana Revenue Board, Indiana Gross Income Tax Division, *Appellant,* *vs.* Bendix Aviation Corporation, *Appellee.*	Appealed from the St. Joseph Superior Court, No. 1. 95883.

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by

ARTERBURN, *C. J.*
ACHOR, BOBBITT AND LANDIS, *JJ.*, concur.
EMMERT, *J.* not participating.

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IN THE SUPREME COURT OF INDIANA.

Indiana Department of State Revenue, Indiana Revenue Board, Indiana Gross Income Tax Division,
Appellant,
vs.
Bendix Aviation Corporation,
Appellee.
No. 29,458.

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT, No. 1,

HON. E. SPENCER WALTON, JUDGE.

ARTERBURN, *Chief Justice.*

This action was commenced by appellee, Bendix Aviation Corporation, pursuant to the provisions of Acts 1947, ch. 370, § 3, p. 1471, being § 64-2614, Burns' 1953 Replacement, for the purpose of obtaining a refund of gross income and bonus taxes, paid under protest, for the taxable years 1951 through September, 1953, (on fiscal year basis). The trial court entered judgment for appellee in the sum of $546,734.64 as taxes, and interest of $55,587.57 thereon, making a total judgment of $602,322.21.

The case was tried upon a stipulation of facts. Alleged error is presented by the Indiana Department of State Revenue, appellant, by way of a motion for a new trial, alleging that the decision of the trial court was not sustained by sufficient evidence, and was contrary to law.

The appellee is a Delaware corporation qualified and admitted to do business in the State of Indiana. It maintains offices and two manufacturing plants in St. Joseph County, in the State of Indiana. The appellee, during the period in question, received gross income from the United States Government and from its prime contractors on certain

government contracts. These contracts provided for the manufacture by the appellee of certain articles needed for the Armed Forces. It is appellee's contention that the receipts from all of these contracts are not subject to the gross income and bonus taxes of the State of Indiana for the reason that the State is prohibited from taxing such transactions under the Commerce Clause, (Art. 1, § 8, Cl. 3), of the United States Constitution.[1]

The Gross Income Tax Law of the State of Indiana insofar as applicable here, provides in Section 2 thereof, as follows:

> "There is hereby imposed a tax upon the receipt of gross income, measured by the number or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the state of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the state of Indiana, of all persons who are not residents of the state of Indiana, * * *."
>
> Acts of 1937, ch. 117, § 2, p. 604, being § 64-2602 Burns' 1953 Replacement.

It also provides as follows:

> "There shall be excepted from the gross income taxable under this act [§§ 64-2601—64-2631]:
>
> "(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between

1. The appellant makes no contention that an exemption from the tax exists merely because the government is a party to the contract. No law is suggested which gives a contractor with either the state or federal government an exemption from payment of an income tax levied on proceeds from such contracts by the other government. *State of Alabama* v. *King & Boozer* (1941), 314 U. S. 1, 86 L. Ed. 3, 62 S. Ct. 45, 140 A. L. R. 615.

this state and foreign countries, but only to the extent to which the state of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America. * * *."

Acts 1945, ch. 143, § 2, p. 311, being § 64-2606 Burns' 1953 Replacement.

The tenor of appellee's argument seems to be founded upon the premise that if the tax is applicable to any phase of interstate commerce it is *per se* invalid. We are not prepared to accept this proposition *in toto*. We find no such inflexible rule has been laid down.

Before the adoption of the Federal Constitution the States possessed the power to tax without restraint or interference. The several States still retain and reserve this very necessary power except insofar as it is limited or restricted by the United States Constitution. We are concerned here with only one of those provisions in that Constitution, namely, the power granted to Congress "to regulate commerce with foreign nations, and among the several States * * *." Art. 1, § 8, Cl. 3, United States Constitution. This provision, it should be noted, does not *in terms prohibit* the States in the full exercise of their taxing, police, or other reserved powers; however, although these words are permissive in character to Congress as distinguished from prohibitive to the States, the interpretive language of the Supreme Court of the United States has given them a meaning which limits the several States in their taxing power in some instances. The delineation of this field within which the States may not encroach, and on the other hand, beyond which Congress may not wander, is not as distinct nor as clear as one might desire.

Freeman v. *Hewit* (1946), 329 U. S. 249, 91 L. ed. 265, 67 S. Ct. 274.

Yet, under this rather simply worded grant of power to Congress, the States cannot be deprived of their inherent and reserved taxing power, and on the other hand, they cannot by the exercise of the taxing power interfere with the congressional regulatory power over commerce among the several states.[2]

The only basis for limiting a sovereign State's taxing power under the issues raised here, is that it would interfere with the regulatory powers of Congress over commerce among the States. If there is no interference, and commerce is unimpeded, there is no warrant or authority for holding that the Commerce Clause in the Constitution of the United States makes a State's taxing laws invalid. To hold otherwise, is to create a fictitious assumption, rather than accept the realities and practicalities of the situation.

In the case of *International H. Co.* v. *Dept. of Treasury* (1944), 322 U. S. 340, 88 L. ed. 1313, 1316, 1317, 64 S. Ct.

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2. The United States Supreme Court has not offered a very dependable guide in this area. In a 5-4 decision (*Freeman* v. *Hewit* (1946), *supra*, 329 U. S. 249, 91 L. ed. 265, 67 S. Ct. 274, a majority of the court held the Indiana tax on a sale of intangibles by a broker across the State line to be invalid because it was a "direct" tax; that it was irrelevant whether or not the tax was in reality any "burden" on interstate commerce.

The dissenting opinions of the other four justices held in substance such a tax did not impede or interfere with constitutional regulatory power of Congress, and that all commerce was treated alike.

Of the original membership of the court participating in the decision there remains on the present court two members on each side of this issue. The *then* majority of the court apparently abandoned any attempt at being consistent with the past or offering any guidepost for the future when it said, (Frankfurter, J.) on page 252 of 329 U. S., 271 of 91 L. ed.:

> "To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."

The four dissenting justices seemed not to have such uncertainty about the necessity of settled legal principles.

1019, 64 S. Ct. 1030, the Supreme Court said in this connection:

> "But as we held in the *Wood Preserving Corp.* case, neither the Commerce Clause nor the Fourteenth Amendment prevent the imposition of the tax on receipts from an intrastate transaction even though the total activities from which the local transaction derives may have incidental interstate attributes.
>
> • • • • •
>
> "Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (*Nelson* v. *Sears, R. & Co.*, 312 U. S. 359, 363, 85 L. ed. 888, 891, 61 S. Ct. 586, 132 A. L. R. 475), we must ackowledge that the sales tax sustained in the *Berwind-White* case 'was, in form, *imposed upon the gross receipts from an interstate sale.*' Lockhart, Gross Receipts Taxes on Interstate Transportation and Communication, 57 Harvard L. Rev. 40, 87. But that case did no more than to hold that those in interstate trade could not complain if interstate commerce carried its share of the burdens of local government which helped sustain it. And there was no showing that more than that was being exacted." (Our italics.)

In another case, the United States Supreme Court had this to say:

> "Nor is taxation of a local business or occupation which is separate and distinct from the transportation of intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business."
>
> *Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250, 253, 82 L. ed. 823, 58 S. Ct. 546, 115 A. L. R. 944.

The same court said previously:

> "The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of national policy."
>
> *Federal Compress & W. Co.* v. *McLean* (1934), 291 U. S. 17, 23, 78 L. ed. 622, 627, 54 S. Ct. 267.

Of course, a state may not, under the guise of a tax, place a real burden upon commerce among the several states.

> *New York, L. E. & W. R. Co.* v. *Pennsylvania* (1895), 158 U. S. 431, 39 L. ed. 1043, 15 S. Ct. 896;
>
> 15 C. J. S., Commerce, § 5, p. 259;
>
> 51 Am. Jur., Taxation, § 203, p. 262.

At the same time it is not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of the state tax burden.[3]

> *Western Live Stock* v. *Bureau of Revenue* (1938), *supra*, 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546, 115 A. L. R. 944.

It follows that the exemption of those engaged in interstate commerce from taxation borne by others should not be extended beyond the necessity of keeping the movement of such commerce free from interference or a "burden" as is sometimes said. To rule otherwise, expands the Commerce Clause by implied and fictitious assumptions to a point where it conflicts with another constitutional provision,

3. States may levy taxes on motor vehicles engaged in interstate commerce for the use of public highways where the privileged tax is no greater than that imposed upon other vehicles not engaged in interstate commerce. *Clark* v. *Poor* (1927), 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702; *Interstate Transit* v. *Lindsey* (1931), 283 U. S. 183, 75 L. ed. 953, 51 S. Ct. 380; See also Court, Commerce and Trade Payers (1940), 16 Ind. L. J. 144.

and unnecessarily invades the state's sovereign and reserved powers.

The tax here involved is valid unless it is shown to interfere with congressional regulation of commerce among the states. That is ultimately the test, since fundamentally that is all the constitution takes from the State's sovereign powers and grants to the Congress of a Federal government, intended originally to be a government of *limited* powers.

Coverdale v. *Arkansas-Louisiana P. L. Co.* (1938), 303 U. S. 604, 82 L. ed. 1043, 58 S. Ct. 736;
McGoldrick v. *Berwind-White Coal Min. Co.* (1940), 309 U. S. 33, 84 L. ed. 565, 60 S. Ct. 388, 128 A. L. R. 876;
J. D. Adams Mfg. Co. v. *Storen* (1938), 304 U. S. 307, 82 L. ed. 1365, 58 S. Ct. 913;
Swift & Co. v. *United States* (1905), 196 U. S. 375, 49 L. ed. 518, 25 S. Ct. 276.

The stipulation of the parties goes into considerable detail in outlining the transactions which result in the receipts which are claimed to be taxable. A description of each step of the performance and its sequence is set forth. Both parties charge the other with over-emphasizing certain details and minimizing others. To us, there appears nothing particularly unusual in these details or the sequence. The transactions must be looked upon as a whole. The details should not be permitted to obscure a perspective of the larger picture.

The transactions involved in this case relate exclusively to those articles ultimately to be moved out of the State after their manufacture at the two plants of the appellee at South Bend, Indiana. The performance on the part of Bendix was essentially that of manufacturing. During this process and at its termination, the Government and

the prime contractors, as the case may be, made their inspections. Then came a time when "acceptance" of the manufactured article was made by the Government and the prime contractors. Without going into detail as to the provisions of the various contracts of the Army, Navy and Air Force, we quote from Section XIV of the Armed Services Procurement Regulation entitled "Inspection and Acceptance" which is applicable to the contracts involved:

> "14-200. General.—Acceptance is the act of an authorized agent of the Government by which the Government acknowledges and agrees that the supplies or services are in conformance with the contract requirements, including those of equality and quantity. Passage of title does not necessarily occur at the time of acceptance. Depending upon the provisions of the contract, acceptance may be effected prior to delivery, at the time of delivery, or after delivery. Generally, however, contracts shall provide that acceptance shall be accomplished as promptly as practicable after delivery. Except as may otherwise be provided in the contract, acceptance shall be conclusive except as regards to latent defects, fraud or such gross mistakes as amount to fraud. Except as otherwise provided in this section, supplies and services shall not be accepted prior to inspection. Inspection where made prior to acceptance, shall be merely for the convenience of the Government and without binding effect as to acceptance."

The above provisions seem to us to cover the situation adequately so far as we are here concerned.

Insofar as the matter of the passage of title of the manufactured articles affects the question here involved, it is agreed by the parties that in those cases where the Government made partial payments under a contract, title vested in the Government at that time, and all things connected with the specific contract, from the raw material through partially processed and completely processed and manu-

factured items. It was further stipulated in that connection that:

> "* * * it is agreed that Defendant [Indiana Department of State Revenue] may contend that the Plaintiff was furnishing special services rather than making a sale of goods."
> Stipulation A-1.

With reference to the remaining manufactured articles for which no partial payment was made, the contract of the parties provided for the delivery as follows:

> "A-8. Delivery and Shipment. All of the items sold under the contracts involved in this action were shipped to the Government by common carrier, some being shipped by rail, some by truck, and all shipments being made f.o.b. carrier's equipment at the South Bend, St. Joseph County, Indiana, Plant of Plaintiff. All of the items sold by Plaintiff were placed on board the carrier's equipment by Plaintiff in accordance with the contract requirement. All shipments were made f.o.b. upon Government bills-of-lading. Each contract required delivery by Plaintiff on certain dates or within certain periods."

Those articles manufactured by appellee under sub-contracts for prime contractors of the Government were to be delivered in the same manner, namely, to the Government's carrier at the appellee's plants in South Bend. The shipping destinations on the bills-of-lading in all instances were outside the geographical limits of the State of Indiana. This was true for all manufactured articles under contracts in which the Bendix was a prime contractor, as well as those in which it was the sub-contractor. The Government designated the destination, arranged for and provided the carrier. In all shipments the Government's bills-of-lading were used wherein the property shipped was identified as the property of the United States Government. The distinction to be pointed out between the commercial bill-of-

lading and the Government bill-of-lading is that the former is a contract between the shipper or consignor and the carrier, while the latter, by its language, is a contract between the Government and the carrier. The form of this instrument was prepared by the Government and one of the reasons therefor, was for the purpose of securing the advantages of certain rates for shipments over land-grant railroads. The contracts in this case provided for preferences to such railroads in the shipment of goods here involved. In considering the legal effect of a Government bill-of-lading, the United States Supreme Court has said:

> "* * * the title passed to the United States by delivery at the initial point of shipment to the carrier as agent. Land-grant rates were applicable."
>
> *Illinois Central R. Co.* v. *United States* (1924), 265 U. S. 209, 68 L. ed. 983, 44 S. Ct. 485.

The parties seem to be in substantial agreement that at the time the manufactured articles were loaded on the carriers at the Bendix plants in Indiana, title and possession passed from appellee to the Government, and all control over its movement passed from Bendix.

> Uniform Sales Act, Acts 1929, ch. 192, § 19, p. 628, being § 58-203, Burns' 1951 Replacement.

Bendix contends that in accordance with the terms of the contract, it manufactured, packaged, and placed the goods on a common carrier "in the stream of commerce" bound for out-of-state destination, and that such commerce is exempt from state taxation. The appellant, on the other hand, says that the tax here is laid upon an entirely local Indiana activity consisting mainly of the manufacture of the articles for which the receipts involved here were obtained, and that although Bendix had the obligation to make delivery at the factory on a carrier, its title, possession, and control over the articles ended at that point in appel-

e's plant in Indiana. Before a tax is invalid appellant ays "there must be some activity of the seller which xtends beyond the borders of the state of Indiana." The ppellee had no duty to make delivery at any point outside ie state of Indiana—in fact, outside its plant.

There is no question about the government bill-of-lading xing the title in the Government. When the articles manfactured were placed f.o.b. carrier at the plant the Governent had control and possession, and could have rerouted r stopped the transportation at any point thereafter.

The authorities cited by the parties center mainly about ie interpretation to be given the cases of *Gross Income ax Div.* v. *Conkey Co.* (1950), 228 Ind. 352, 90 N. E. 2d 05, Cert. Denied (1951), 340 U. S. 941, 95 L. ed. 679, 71 . Ct. 502 and *Treasury of Indiana* v. *Wood Preserving orp.* (1941), 313 U. S. 62, 85 L. ed. 1188, 61 S. Ct. 885.

In the *Conkey* case a printer and manufacturer of books nder contract with the publisher, sent the books after anufacture across state lines to purchasers as directed y the publisher, who was selling the books to his customers. he court said in the *Conkey* case, *supra*, at page 357, ith reference to the Indiana tax applicable to the receipts erefrom by the printer:

> "It would seem to us that as to the printing and binding of books, as here, the appellee was rendering a local service and the gross receipts therefrom are not from interstate commerce. What appellee was being paid for was the service rendered and its materials used in an activity purely local in nature. *Dept. of Treasury of Indiana* v. *Ingram-Richardson Mfg. Co.* (1941), 313 U. S. 252, 85 L. ed. 1313, 61 S. Ct. 866; *Western Live Stock* v. *Bureau* (1938), 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546.
>
> . . . . .
>
> "The delivery of the books by appellee to the carrier in the manner as above pointed out was but an

incident to and in aid to its local printing and binding business as was the case in *Dept. of Treasury* v. *Ingram-Richardson, supra.*"

In addition, the manufacturer in the above case also bought bookcases to be used with the set of books printed, and resold the cases with the books and shipped the cases across state lines to customers as directed by the purchaser. The court in that case held those transactions were not entirely local, but were in interstate commerce. No manufacturing was involved in the latter transaction, and it seems the printer or seller assumed the obligation to make deliveries, or put the buyer in possession at a point outside the State of Indiana.

Gross Income Tax Division v. *L. S. Ayres & Co.* (1954), 233 Ind. 194, 118 N. E. 2d 480.

In the *Wood Preserving* case, *supra*, the company sold ties to a railroad. The railroad ties were inspected by an agent of the railroad as they were brought to its siding in Indiana from points in Indiana, and those accepted were immediately placed on cars belonging to the railroad. A bill-of-lading was then executed by the Wood Preserving Corporation designating itself as consignor. An agent of the railroad at Finney, Ohio, was named consignee. The purchasing railroad was designated as the carrier. The United States Supreme Court held that the receipts from the sale of the ties were properly taxable by the State of Indiana.

The appellee, Bendix, in its brief, makes the following comment on this case:

"The plaintiff in the instant case and the Defendant here are not in dispute over transactions of the kind which occurred in the *Wood Preserving* case. If, for example, items are manufactured and sold to the United States Government to be transported to a point outside the State by the Government's own conveyances

and the Government then sends its own transportation equipment to South Bend to pick up the items, as for example, by military plane at our County airport, everyone would admit that the State of Indiana is entitled to collect gross income tax on the gross receipts from such sale. The example corresponds to the facts of the *Wood Preserving* case."

The line which appellee draws between taxable and non-taxable receipts appears to us to be unjustified. There is no difference in the effect on interstate commerce whether the purchaser in such a case carries the article away and across the state line *in his own vehicle*, or *has an agent* on hand at the time of delivery to take possession and carry it across the state line for him. In either instance, the result is the same. In the case before us, the carriers who came to the plant of the Bendix Corporation in Indiana and took delivery of the manufactured articles were agents of the purchasers, and to all practical effects, it is the same as if the purchaser in person had taken the articles at the plant.

We believe many of the points of dispute in this case are answered by the case of *International H. Co.* v. *Dept. of Treasury*, *supra*, (1944), 322 U. S. 340, 88 L. ed. 1313, 64 S. Ct. 1019, 64 S. Ct. 1030; *Dept. of Treasury* v. *International Harvester Co.* (1943), 221 Ind. 416, 47 N. E. 2d 150.

This is particularly true in connection with appellee's reliance upon a statement in the *Conkey* case that "the transporting of the property out of the State was not within the contemplation of or part of the local sales contract."

The Supreme Court of the United States in the *International Harvester* case, *supra*, gave consideration to various types of transactions covered by the Indiana tax, and made the following statement at page 345 of 322 U. S., p. 1317 of 88 L. ed.:

"The Class D sales are sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes to

> Indiana, takes delivery there and transports the goods to another state. The *Wood Preserving Corp.* case indicates that it is immaterial to the present issue that the goods to be transported out of Indiana immediately on delivery. Moreover, both the agreement to sell and the delivery took place in Indiana. Those events would be adequate to sustain a sales tax by Indiana."

The *mere knowledge* on the part of the seller in Indiana of the intended out-of-state destination of goods sold and delivered in Indiana to a buyer does not convert an intrastate transaction to an interstate transaction, and thereby create a burden interfering with congressional regulation of such commerce.

Appellee, Bendix, in its brief, makes the further contention:

> "The Appellee's obligations to the United States Government are a continuing thing with delivery upon the selected carrier the constitutional equivalent of the delivery of the goods to the point of destination."

The weight of authority seems to be against the appellee on this point.

> "It is generally held that a movement merely in preparation for export—in other words, a mere transfer of the property to a depot or other place within a state from which the transportation or journey to another state is to begin at a convenient time—is not a part of that transportation, so as to exempt the property because of such transfer or movement from state taxation upon the ground of interference with or burden upon interstate commerce."
>
> 51 Am. Jur., Taxation, § 205, p. 266.

The Supreme Court of the United States has also said in the *International Harvester* case, *supra*, at page 345 of 322 U. S., p. 1317 of 88 L. ed.:

> "In *McGoldrick* v. *Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. ed. 565, 60 S. Ct. 388, 128 A. L. R. 876, we had before us a question of the constitutionality

of a New York City sales tax as applied to purchases from out-of-state sellers. The tax was 'laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price.' *Id.* 309 U. S. p. 43, 84 L. ed. 568, 60 S. Ct. 388, 128 A. L. R. 876. And it was 'conditioned upon events occurring' within New York, *i.e.*, the 'transfer of title or possession of the purchased property.' *Id.* pp. 43, 44. Under the principle of that case, a buyer who accepted delivery in New York would not be exempt from the sales tax because he came from without the State and intended to return to his home with the goods. The present tax, to be sure, is on the seller. But in each a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce. In neither does the tax aim at or discriminate against interstate commerce. The operation of the tax and its effect on interstate commerce seem no more severe in the one case than in the other.''

Looking at these facts as a whole before us, the receipts resulted from transactions completely performed in Indiana. The performance was essentially local in character. The tax does not discriminate against interstate commerce nor does it interfere with the grant of power to Congress to regulate commerce among the several states.

Indiana Farmers Guide Pub. Co. v. *Dept. of Treas.* (1940), 217 Ind. 627, 29 N. E. 2d 781;
11 Am. Jur., Commerce, § 34, p. 34.

Since the facts herein have been stipulated a new trial will serve no purpose. The judgment is reversed with direction to enter judgment for the appellant.

Achor, Bobbitt and Landis, *JJ.*, concur.

Emmert, *J.*, not participating.

No. 29458 In the Supreme Court, May Term, 1957 Ind., Dep't of State Revenue, Gross Income Tax Div'n vs. Bendix Aviation Corp. Certified Copy of Opinion. Mabel E. Lyons, *Clerk Supreme Court.*

APPENDIX "B"

STATE OF INDIANA
ST. JOSEPH COUNTY } ss:

IN THE ST. JOSEPH SUPERIOR COURT NO. 1.

February Term, 1956.

Bendix Aviation Corporation,
A Corporation
Plaintiff,
vs.
Indiana Department of State Revenue, Indiana Revenue Board, Indiana Gross Income Tax Division,
Defendant.

Cause No. 95883

OPINION.

This suit was brought by the Bendix Aviation Corporation to recover taxes collected by the Indiana Department of State Revenue under the Indiana Gross Income Tax Act of 1933. The transactions taxed all involved sales as primary contractor to the United States Government or on a sub-contract to a corporation with a contract with the government.

Facts are stipulated by the parties and show six separate types of transactions in question.

The question, in each of the six types of transactions, is whether or not the transaction constituted sales in interstate commerce that would come under the provisions of

the Indiana Gross Income Tax Act which provides in its Section 64-2606 (Burns Indiana Statutes) that there shall be excepted from the gross income taxable under this act "(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the state of Indiana is prohibited from taxing such gross income tax by the Constitution of the United States of America. There shall also be excepted from such gross income, salaries, pensions, and other emoluments paid by the United States of America, but only to the extent that the state of Indiana is prohibited from imposing a tax upon such salaries, pensions, emoluments, interest and or earnings, by the Constitution of the United States of America."

It is conceded that the Indiana Gross Income Tax Act is a burden on interstate commerce *J. D. Adams Mfg. Co.* v. *Stores*, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429. However, it has also been held that the gross income tax may be imposed on receipts from transactions which are intrastate, "even though the total activities from which the local transaction derives may have incidental interstate attributes" *International Harvester Co.* v. *Dept. of Treasury, State of Indiana*, 322 U. S. 340.

Here the transactions involved undoubtedly have interstate attributes. All transactions involved a contract for the purchase of manufactured goods, of a type ordinarily manufactured by the plaintiff for other customers, which are then manufactured in the Indiana plants of the plaintiff and delivered by common carrier at places outside of the state of Indiana.

Plaintiff contends that the transactions are interstate in nature so that they cannot be taxed under the Indiana Gross Income Tax Act.

Defendant contends that certain practices and contractual provisions between the plaintiff and the U. S. government, or contractor of the U. S. government, make each of the transactions involved intrastate, with only interstate attributes.

Plaintiff has numerous contracts which, in all probability, are not taxable under this law because they come within the provisions of the law as stated in *J. D. Adams Mfg. Co.* v. *Stores, supra.* Typical of these transactions would be a contract with the X Company in which the X Company would contract for the purchase of certain manufactured goods with the plaintiff; plaintiff would then manufacture these goods in their Indiana plants and deliver said product f.o.b. common carrier in Indiana for shipment to X outside the state of Indiana.

In what way do the transactions here questioned differ from this typical non-taxable transaction?

First, the contractual provisions and practices involving the inspection of the goods. Here the government maintained in the plant of the plaintiff a group of inspectors who in actual practice make the final inspection for the buyer. However, on occasions, after final inspection and packaging, which had been approved, a completely manufactured article, which had been inspected and approved, was broken out of the package and plaintiff was required to perform further operations thereon, if further inspection showed it to be defective.

Second, the contractual provisions and practices involving acceptance of the goods by the government. Inspection preceded acceptance, both in practice and by the provisions of the contract. Form DD 250, which is Exhibit "F" in the stipulation, is probably the instrument of acceptance, and this was executed by the government agent at the plant of the plaintiff in Indiana sometime after the

manufactured articles were placed on board the common carrier for shipment.

Third, the contractual provisions and practices regarding the shipment of the goods. The buyer retained the right to designate the common carrier and shipment was made on Government bill-of-lading (Exhibit "D" of stipulation), which described the articles shipped as "public property" or property of the buyer. Also, in some of the contracts, the destination of the goods was not disclosed as being outside of the state of Indiana until after the contract was made.

These three factors are the most important involved, although there are two other fact patterns. In some of the transactions the question of partial payment under the government contract when, by action of the contract, title passed is a factor. Another classification involved those contracts by the plaintiff as a sub-contractor with contractors of the U. S. Government.

In *Department of Treasury* v. *Wood Preserving Co.* 313 U. S. 62; 85 L. Ed. 1188, 61 S. Ct. 885 (1941) we have several similarities with the present case. Inspection was made by the buyer in Indiana. Acceptance was made by the buyer in Indiana. The language of the court in this case is as follows: "In these transactions, respondent through its agent at once accepted from its vendors the ties which the Railroad Company found satisfactory and then and there sold and delivered these ties to the Railroad Company. These were local transactions—sales and deliveries of particular ties by respondent to the Railroad Company in Indiana."

One difference appears in the instant case from the facts in the *Wood Preserving* case That difference is in the shipment or delivery of the goods to the buyer. In the instant case the delivery was on board a common carrier

for transportation to the buyer outside of the state of Indiana. In the *Wood Preserving* case the language of the court is "The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment." Clearly the court considered the transaction there completed even before the loading on the railroad cars, and thus a taxable transaction.

In the *Wood Preserving* case the delivery was made to the buyer under a contract whereby the buyer was to take immediate control of the purchased article at an agreed price.

True the railroad buyer under another contract agreed to then transport the ties to the plant of the seller outside the state of Indiana, but the buyer had complete control of the purchased article and conceivably could have delivered the ties any place, including a place within the state of Indiana. If the railroad did not deliver the ties to the plant of the seller in Ohio there could possibly have been an action by the seller for a breach of contract for the processing of the ties, but nothing more was to be done by the seller as far as the sale of the ties in Indiana was concerned. In the instant case the U. S. government would not take actual possession of these articles until they were delivered by the common carrier outside the state of Indiana. Neither the buyer nor the seller had control of the transportation; it was a common carrier in interstate commerce.

In my opinion, the use of the government bill-of-lading was not in itself a delivery to the government. Clearly, the parties contemplated and, in fact, did place the articles on board the common carrier and deliver the articles in interstate commerce. In *Gross Income Tax Division* v. *Conkey*, 228 Ind. 352; 90 N. E. (2d) 805 (1950) Cert. Den. 340 U. S. 941; 95 L. Ed. 679, 71 S. Ct. 504, the court says

"The Sale of these bookcases can be distinguished from the sale considered in *Dept. of Treasury* v. *Wood Corp., supra,* as there the property was actually delivered by the seller to the purchaser who accepted it in Indiana. In that case the transportation of the property out of the state was not within the contemplation of or part of the local sales contract."

Typical use of the government bill-of-lading can best be illustrated by its use in the sub-contracts of the plaintiff considered here. In my opinion, there is no question but that the articles sold by the plaintiff under sub-contracts with prime contractors of the U. S. Government, said articles to be delivered outside the state of Indiana, are clearly transactions in interstate commerce and not taxable under the Indiana Gross Income Tax law. But in these cases there is also used, in the shipment of these articles between two government contractors both of whom are private corporations, the government bill-of-lading. Therefore the use of both by the prime contractor and the sub-contractor can only be held to be incidental and not a determining factor.

We have left to consider only the matter of the passing of title upon a partial payment by the government to the contractor plaintiff. Consideration has been given to the provisions of the contract between the U. S. government and the plaintiff and also the practice under these contracts. In my opinion, it would not be consistent to hold that the passing of title in this instance would be sufficient to change the concept of the transactions so that it would become a service contract and fall within the decisions such as *Dept. of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252, 61 S. Ct. 866 (1941) and, *Gross Income Tax Division* v. *Conkey, supra,* (as to the printing and binding of books).

In the opinion of this court, all the transactions here considered are interstate in nature and cannot be construed as intrastate with only interstate attributes. These transactions directly involve the great universal stream of commerce between the several states. It must be remembered that the Indiana Gross Income has expressly been determined to be a burden on interstate commerce and that if the Indiana Legislature wishes to tax transactions such as those here involved it may at any time adopt a privilege tax and do so. It is not the duty of the court to establish the taxing policy of this state.

If the attorneys for the plaintiff will prepare the proper judgment form, judgment will be entered consistent with this opinion.

E. SPENCER WALTON, *Judge* (Signed)
St. Joseph Superior Court No. 1

Done at South Bend, Indiana, this 13th day of April, 1956.

APPENDIX "C".

Judgments Below.

The final order of the Supreme Court of Indiana was a simple reversal of the judgment of the Trial Court with directions to enter judgment for the Appellee herein. The record entry (Tr. p. 112), being formal only, is not set forth.

The judgment of the Trial Court was in words and figures as follows (Tr. pp. 30-31):

Decree.

Comes now the Plaintiff by its Attorneys, Richey W. Whitesell, and Crumpacker, May, Beamer, Levy & Searer, and having filed herein its amended complaint, which is in the following words and figures, to-wit: (Refer to pages ..... for amended complaint), and comes also the Defendant by Edwin Steers, Jr., Attorney General of the State of Indiana, and Carl Franceschini, Deputy Attorney General of the State of Indiana, and having filed herein its answer thereto, which answer is in the words and figures following, to-wit: (Refer to page ..... for answer to amended complaint), and said cause being now at issue is submitted to the Court for trial without the intervention of a jury, a jury having been expressly waived by both parties, and the parties having stipulated all of the evidence in writing, and having filed said written stipulation with the Court, and the Court having examined said stipulated evidence, the briefs of both parties, and having heard argument of counsel and being fully advised in the premises, now finds for the Plaintiff and against the Defendant; and that it is entitled to recover from the Defendant the sum of Five Hundred Forty-six Thousand Seven Hundred Thirty-four

and Sixty-four Hundredths Dollars ($546,734.64) of taxes and interest illegally collected, and interest of Fifty-five Thousand Five Hundred Eighty-seven and Fifty-seven Hundredths Dollars ($55,587.57) from the date of overpayment, and costs.

It Is, Therefore, Considered, Adjudged and Decreed by the Court that the Plaintiff recover from the Defendant the sum of Six Hundred Two Thousand, Three Hundred Twenty-two and Twenty-one Hundredths Dollars ($602,322.21), and costs.

Dated this 18 day of April, 1956.

E. Spencer Walton,
Judge of the St. Joseph Superior Court No. 1.